NO. 41302-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

BRUCE LEE FRITZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00389-4

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

Between January 1, 2008, and March 13, 2010 Bruce Lee Fritz (hereafter, "the defendant") repeatedly raped and molested his fiancée's daughter, L.M.F. (CP 3-6, RP 124-42). L.M.F. was between the ages of six and eight years old at the time. (RP 131). The defendant was between the ages of thirty-two and thirty-four years old. (CP 6).

1. Procedural History

The State of Washington (hereafter, "the State") charged the defendant by amended information with four counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. (CP 3-6). In addition, the State alleged two aggravating factors for each count, to wit: that the acts were part of an ongoing pattern of sexual abuse with a minor and that the defendant used his position of trust to facilitate the crimes. (CP 3-6).

Trial commenced on August 2, 2010 (RP 49). L.M.F. testified at trial. (RP 125). Prior to trial the court held a hearing, pursuant to RCW 9A.44.120, in which it found L.M.F. was competent to testify and her out-of-court statements to her mother, her grandmother, Vancouver Police Department Detective Aaron Holladay, and pediatric nurse practitioner Marsha Stover were admissible as evidence at trial. (RP 74-76).

On August 4, 2010, following trial, the jury found the defendant guilty of all charged counts. (CP 41-46). In addition, the jury found the State had proven the presence of each aggravating factor, for each count. (CP 47-58).

2. Evidence Presented at Trial

L.M.F.'s mother, Regina Rae Fowler, testified that she loved the defendant, the two were engaged to be married, the defendant was a father-figure to her daughter, and L.M.F. used to call the defendant, "dad." (RP 159-61). Fowler testified that she and L.M.F. moved in with the defendant in 2008. (RP 158, 160). The three first lived in an apartment and they later moved into a house. (RP 158, 160). Fowler said, during this time, she was attending college and she was working the graveyard shift at her work. (RP 160-61). Consequently, there were many occasions in which Fowler left her daughter home alone with the defendant and under the defendant's care. (RP 161). Fowler said she trusted she could leave L.M.F. in the defendant's care. (RP 161).

Fowler said, on March 13, 2010, after L.M.F. and the defendant returned from church, L.M.F. asked her mother if she could speak to her alone, in the bedroom. (RP 165-66, 194). L.M.F. stood next to the bed, holding her legs and crying. (RP 166). Fowler assured L.M.F. she could

tell her anything. (RP 167). L.M.F. told Fowler the defendant "tries to have sex with me." (RP 167). Fowler asked L.M.F. if she was sure and if she was telling the truth. (RP 167). L.M.F. responded affirmatively to both questions. (RP 167). L.M.F. told her mother the defendant tried to have sex with her fifteen times or more. (RP 168).

Fowler did not ask any other questions of her daughter. (RP 190). Instead, she confronted the defendant, who was in the garage. (RP 167-68). The defendant initially denied any misconduct with L.M.F. (RP 167-68). The defendant started crying soon thereafter. (RP 169). Fowler dropped her daughter off at her grandmother's house that night. (RP 170). The following morning, Fowler told the defendant she "needed closure." (RP 172). She asked the defendant "what he did to [L.M.F.]?"[1] (RP 190). The defendant cried again. (RP 172). He told Fowler that he "rubb[ed] his penis on [L.M.F.'s] privates" - - "he rubbed his penis on her "butt." (RP 172, 189). He said he did it "just twice." (RP 172). Fowler left the house and later called 911. (RP 173, 188).[2]

Fowler testified, before her daughter told her about the sexual assault, she took L.M.F. to the doctor because L.M.F. had complained

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[1] Fowler testified she did not ask the defendant anything more specific than "what he did to L.M.F." because she did not know any details of the sexual assaults at that time. (RP 190).

[2] Fowler testified, even at this time, she was not on bad terms with the defendant. (RP 173).

"about her private hurting." (RP 176). The doctor lifted up L.M.F.'s underwear and concluded, "she's fine." (RP 177).

Vancouver Police Department Detective Aaron Holladay also testified at trial. Holladay interviewed L.M.F. on March 14, 2010, regarding the sexual assaults. (RP 272, 278). Holladay spoke to L.M.F. privately, at Luce's home. (RP 272, 278). Holladay has been employed with the Vancouver Police Department for thirty years. (RP 273). Holladay is trained in conducting forensic interviews with children and has interviewed at least one thousand children. (RP 273-75).

Prior to interviewing L.M.F., Holladay asked L.M.F. to identify the anatomical parts on a cartoon drawing of a human body. (RP 282). L.M.F. correctly identified the anatomy on the picture. (RP 284-86).

Pursuant to his training, Holladay asked L.M.F. non-leading, non-suggestive, open-ended questions, such as "what do you think is the reason I am here?" (RP 274, 281). L.M.F. responded, "probably because of my dad." (RP 281). Holladay asked L.M.F., "did your dad do something he's not supposed to?" (RP 281). L.M.F. responded, "he had S-E-X with me." In response to a series of non-leading and non-suggestive questions, L.M.F. provided the following information: L.M.F. said the defendant had been having "S-E-X" with her since she was six years old. (RP 282). "I'm eight," L.M.F. said, "that's two years." (RP

282).[3] L.M.F. said the first time the defendant had sex with her was at their old apartment, in her bedroom. (RP 286). The defendant came into her bedroom and took her clothes off. (RP 287). She said "he took his clothes off and licked my crotch with his mouth." (RP 287).

L.M.F. said, another time, after taking her clothes off in her bedroom, the defendant and L.M.F. were in the bathroom and "he tried to stick his wiener in my bottom...[h]e was trying to put me on the floor and I was screaming and crying...[a]nd then he tried to stick it in...[i]t hurt really bad and he told me to shut up and just relax." (RP 287).

L.M.F. described separate incidents that happened on the couch and in the defendant's bedroom. (RP 287). She said, "[o]n the couch and in the bedroom he tries to kiss me on the lips...he likes to kiss me on the neck in his bed...[h]e was trying to go up and down on me and put his wiener in my crotch." (RP 288). She said he took her clothes off when this happened. (RP 288).

L.M.F. said the defendant would put on a "blue and green stripes robe" and his penis was "sticking straight up" during these incidents. (RP 288-89). L.M.F. said "[i]t's the same thing...[h]e likes to kiss my body all over." (RP 286). She said, the defendant liked to lick her "on my bottom," "my boobs," "[m]y crotch." (RP 289). She said, "[h]e tries to put his

[3] L.M.F.'s birthday was on May 17. (RP 127).

wiener in me and that's when the liquid was coming from his wiener." (RP 290). L.M.F. said the liquid "was a milk liquid that looked liked pus and he said it makes him feel like pleasure." (RP 291). She said the liquid would go "[o]n my bottom and on my crotch." (RP 291).

L.M.F. described pornographic videos that the defendant showed her "in his bedroom...with the door shut." (RP 292). She said, when they watched the videos "[h]e likes to make the liquid come out...from his wiener." (RP 293). After the liquid came out, L.M.F. said the defendant "gets a black rag and he cleans it." (RP 293).

L.M.F. said the defendant would spit on his hand and then, with a physical gesture, she described the defendant stroking his penis. (RP 293). She said, "[a]nd then he likes to put it back in...[into] my crotch." (RP 294).

Detective Holladay made a representation of a vagina with his two fingers. He explained the outside and inside of his fingers. (RP 290). Holladay asked L.M.F., "when her dad's wiener touched her, if it touched her inside or outside?" (RP 290). L.M.F. said "it was inside." (RP 290). She said, "it only went halfway." (RP 290).

L.M.F. said the defendant did these things to her "a lot...like twenty times" at the apartment and "at least thirty times" at the house. (RP 290, 291). L.M.F. said, at the apartment, it happened in her old bedroom,

in the bathroom, in the defendant's bedroom, and on the couch. (RP 286-87). When they moved into the house, it happened "[o]n the couch, in my bedroom, in the living room, and on my dad's bed." (RP 291). "He touches me with his mouth, his wiener and his fingers and he touches me inside." (RP 292). L.M.F. said it had been six or seven days since the defendant had done these things to her. (RP 292).

Detective Holladay asked L.M.F. if the defendant ever took pictures of her. (RP 292). She said "no." (RP 292). Holladay asked L.M.F. if the defendant ever showed her things on the internet. (RP 293). She said "no…I was on the computer and I was trying to look up on the computer how to stop dads from having S-E-X with little girls and he caught me and told me not to tell anybody." (RP 293-94). L.M.F. said the defendant did these things to her when "my mom's not there." (RP 282). She said she never told anyone because "he told me if I told my mom or the police I would never be able to see my family again." (RP 288).

L.M.F.'s grandmother, Darvie Luce, also testified at trial. Luce testified she was fond of the defendant, she was close with L.M.F., and the defendant was a "dad" to L.M.F. (RP 193-95). L.M.F. and her mother lived with Luce prior to 2008, when they moved in with the defendant. (RP 203, 205). Fowler dropped L.M.F. at Luce's home on March 13, 2010. (RP 194). Luce asked L.M.F. "what's going on with you guys?"

(RP 197). L.M.F. began to share information with her about the ongoing incidents with the defendant. L.M.F. told Luce the defendant started doing these things to her when she was six years old and living at the "'old apartment.'" (RP 196). She described the defendant rubbing his penis on her and trying to stick his penis inside her. (RP 196). L.M.F. told Luce about the "rag" that the defendant would use to wipe off "that milky white stuff that big people leave on you." (RP 196, 198). L.M.F. told Luce about a time when the defendant "licked her" on the vagina and kissed her thighs. (RP 197-98). L.M.F. said it "tickled" when he licked her "private part." (RP 200). L.M.F. also said, every time the defendant would do these things to her, he would wear a blue-striped bathrobe and his penis would be "sticking up" underneath. (RP 200). L.M.F. told Luce about a time when the defendant put his penis in her mouth and tried to "shove it down her throat." (RP 199). L.M.F. told Luce about the "big people" movies that the defendant made them watch. (RP 199). She told Luce the defendant would try to do the things in the movies to her. (RP 199). L.M.F. said the defendant told her she would never see her family again if she told anyone. (RP 200). Luce testified she never probed L.M.F. for information; rather, she said to her, "if you want to talk about it is fine. If you don't, you don't." (RP 199).

Marsha Stover, a pediatric nurse practitioner who specializes in genital exams, also testified at trial. (RP 235, 237). Stover physically examined L.M.F. on April 22, 2010 (approximately one and one-half months after L.M.F. reported the abuse). (RP 242). Stover interviewed L.M.F. prior to the examination. (RP 244). Stover said she asked L.M.F. only open-ended, non-suggestive questions, such as: "well, what happened?" (RP 245). L.M.F. told Stover the sexual assaults started when she was six years old. (RP 245). She said it "hurt" when the defendant tried to stick his penis in her.[4] (RP 245). L.M.F. described the defendant going "up and down" on her with his penis; she described him "kissing and licking her" all over her body, including her legs and "'private parts.'" (RP 246). L.M.F. described the defendant trying to "spit on her with his wiener" and then putting his "'hands on it'" and "'rub[bing] it.'" (RP 245). L.M.F. said he always "'put on his robe'" before he did these things to her. (RP 246). L.M.F. said she knew she had to tell her mom when she saw the defendant put his robe on again and she knew her mom was leaving that night. (RP 246). L.M.F. said, "'I could see it in his eyes and he put on his robe. He always put on his robe.'" (RP 246).

[4] Stover testified the hymen is inside the labia minora. (RP 247). She said the hymen is very elastic and it heals quickly; consequently, it would be very unusual to see signs of a sexual assault on a child. (RP 248-49). However, Stover testified it would be extremely painful to a pre-pubescent child to have her hymen touched. (RP 252).

L.M.F. testified at trial approximately five months after she initially reported the abuse. (RP 125). L.M.F. was nine years old and was in the third grade when she testified. (RP 126-27). Consistent with her previous accounts, L.M.F. described multiple sexual assaults where the defendant "put his wiener inside of [her]," "[inside her] bottom," and... in[side] [her] front part." (RP 134). She described the defendant "putting his tongue" on her "private parts" and touching her with his hands all over her body. (RP 136). She said sometimes he would only lick her "private part," sometimes he would only touch her "private part," and sometimes he would only "stick his wiener" inside her. (RP 138-39, 141). She said it "tickled" when he licked her "private part" and "it hurt" when the defendant put his penis inside her. (RP 135, 143). L.M.F. described the pornographic videos the defendant showed her and the "black cloth" he used to "wipe" her on her "bottom" "after he was done." (RP 143). L.M.F. described the defendant's penis as "pink and white." (RP 142).

L.M.F. again stated the sexual assaults started when she was six years old and they always happened at home (in his, in her bedroom or in the bathroom), when her mother was not home. (RP 137, 140). L.M.F. said the assaults happened more than ten times when they lived in the "old apartment" and they happened more than ten times when they moved into the house. (RP 136, 140). L.M.F. said she finally told her mother about

the sexual assaults because she learned at church that "if child molesters hurt little kids or boys or girls, they will be in trouble with God." (RP 155).

On cross-examination, defense counsel asked L.M.F. if she had ever seen the people in the videos licking each other. (RP 146). L.M.F. said she had not. (RP 146). Defense counsel asked L.M.F. if there were a lot of black wash cloths around the house. (RP 156). L.M.F. said there were not. (RP 156). Defense counsel suggested perhaps L.M.F. had seen the defendant and her mother having sex. (RP 153). L.M.F. said she only knew that the defendant and her mother had sex "because he told me."[5] (RP 153).

B. RESPONSE TO ASSIGNMENTS OF ERROR

The defendant claims comments made by the prosecuting attorney during closing argument were prosecutorial misconduct and warrant reversal of all of his convictions. The defendant did not object to these comments at the time of trial, he did not request a curative instruction, and he did not move for a mistrial.

Under the Sixth Amendment, a defendant is guaranteed a fair trial; he or she is not guaranteed an "error-free" trial. *State v. Fisher*, 165

[5] The facts pertaining to closing argument will be discussed in the argument section of this brief.

Wn.2d 727, 746-47, 202 P.3d 937 (2009); *U.S. CONST. amend. VI.* In order to prove prosecutorial misconduct, the defendant must show the prosecutor's remarks were both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). If the remarks were improper and the defendant objected to them, requested a curative instruction, or moved for a mistrial, reversal will be warranted only if there is a "substantial likelihood" the remarks affected the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defendant waives the issue of prosecutorial misconduct if he or she fails to object to the allegedly improper remarks, fails to request a curative instruction, or fails to move for a mistrial. *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994). An exception to the rule of waiver applies only if the misconduct was so flagrant and ill-intentioned that no curative instruction could have prevented the resulting prejudice. *State v. Padilla*, 69 Wn.App. 295, 846 P.2d 564 (1 993). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). "Reversal is not required if the error could have been obviated by a curative instruction

which the defense did not request." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (*internal citations removed*). When defense does not object to a remark made by the prosecutor, there is a strong presumption that the remark "did not appear critically prejudicial to the [defendant]... in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); *State v. Negrete*, 72 Wn.App. 62, 863 P.2d 137 (2993), rev. denied, 123 Wn.2d 1030, 877 P.2d 695 (1994).

1. The prosecutor did not improperly reference facts outside evidence or improperly appeal to the jury's passion or prejudice when she commented on L.M.F.'s innocence and when she said it was "not fun" for L.M.F. to testify.

The defendant claims the prosecutor committed misconduct during closing argument when the prosecutor stated the defendant "destroyed L.M.F.'s innocence" and when the prosecutor stated it was "not fun" for L.M.F. to testify at trial. *Brief of Appellant*, p. 8-9. The defendant claims these comments urged the jury to convict the defendant on grounds other than the evidence presented at trial or improperly appealed to the jury's passions or prejudices. *Brief of Appellant*, p. 10, *citing State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984), *State v. Boehning*, 127 Wn. App. 511, 522-23, 111 P.3d 899 (2005).

A prosecutor may commit misconduct when the prosecutor bolsters his or her case by referring to inadmissible evidence. *Boehning*,

127 Wn. App. at 523. For example, in *Boehning*, during closing argument, the prosecutor made repeated references to facts that pertained to dismissed charges, including: "H.R. was not able to 'talk with this group of strangers as well as she was able to do it one-on-one in the past;'" "there were 'some other charges, those charges aren't present anymore because she didn't want to talk about this as much as she was willing to talk about it before;'" "'it's reasonable that this child might have gone a little farther in discussing what happened to her in a safer environment;'" and "'there's an inference that she must have said something a little bit more, because you heard about some other charges.'" *Boehning*, at 517, 520. On review, the Court found these comments (as well as additional comments) were highly prejudicial, they were flagrant misconduct, and they warranted reversal because the trial testimony did not support the dismissed charges, evidence related to the charges was wholly irrelevant, and the jury could *not* draw reasonable inferences from it. *Id*, at 517, 522-23.

A prosecutor may also commit misconduct when he or she alludes to matters outside evidence in order to appeal to the jury's passion and prejudice. *Boehning*, at 522; *Reed*, 102 Wn.2d at 147; *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). For example, in *Reed*, the Court found the prosecutor improperly appealed to the jury's passion and

prejudice during closing argument when he said: "'[a]re you gonna let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?'" *Reed*, at 143, 147. Similarly, in *Belgrade*, the Court found the prosecutor improperly appealed to the passion and prejudice of the jury during closing argument when, in response to the defendant's admission that he was affiliated with the American Indian Movement ("AIM"), the prosecutor said:

> [w]hat is AIM? Sean Finn is the political wing of the Irish Republican Army. AIM is to the English what Sean Finn is to the Irish. It is a deadly group of madmen. I'm not saying all of them but that's the way they think of it. Kadafi – feared throughout the world. Why? We don't trust his stability...I remember Wounded Knee, South Dakota. Do any of you? It is one of the most chilling events of the last decade. There was the American Indian Movement...that were butchers, that killed indiscriminately...Is AIM something to be frightened of...? Yes it is.

- *Belgrade*, 110 Wn.2d at 506-07.

a. The prosecutor's comment regarding the defendant's "destruction of innocence" was not improper because the prosecutor was explaining how the evidence at trial proved the aggravating circumstance of "abuse of trust."

During closing argument, the prosecutor said the following:

[t]here are few things in this world that we value more than the innocence and purity of a young child. We, as a society, entrust parents with the responsibility of safeguarding that innocence and purity. A father, in particular, has the duty and obligation to protect his children from harm, to keep them safe and to safeguard them from the evils of this world, to protect their innocence.

The defendant, Bruce Lee Fritz, horribly abused that ultimate position of trust. He destroyed the very thing that he was entrusted to protect, little [L.M.F.'s] innocence.

It's the State's job to prove the defendant guilty beyond a reasonable doubt. At this time, I'd like to talk to you about how we have done that.

So, Instruction Numbers 12 through 15, what we call – the charge of rape of a child, are what we call the 'to convict' instructions. And those tell you the elements that the State must prove in order for you to find the defendant guilty...[6]

- (RP 363-64).

Later, during closing argument the prosecutor said:

And then, the reasonable doubt instruction tells you – it tells you what a reasonable doubt is...

A reasonable doubt means that you have an abiding belief in the truth of the charges. It means that you believe that what [L.M.F.] is saying is true. And, if that's what you believe, it is your obligation to find him guilty.

[6] The italicized text indicates portions of prosecutor's closing argument that were not included by the defendant in his brief. The non-italicized text indicates the comments to which the defendant takes exception.

> And I know the testimony that you have to hear in this case is extremely unpleasant, horrible, disturbing. But, let us not forget that [L.M.F.] lived it. She had to live it. She had to live that. That man used his position as protector, guardian to destroy her innocence. And he needs to be held accountable for that. The only verdict in this case is guilty and I respectfully ask you to do the right thing and to find him guilty and hold him accountable for taking her innocence. Thank you.

- (RP 373-74).

The State alleged aggravating circumstances of "ongoing pattern of abuse" and "abuse of trust" for each count of Rape of a Child in the First Degree and for each count of Child Molestation in the First Degree. (CP 3-6, 32-37, Instruction No. 22-27). In order to prove the aggravating circumstance of "abuse of trust," the State had to prove beyond a reasonable doubt (1) the defendant was in a position of trust with L.M.F. and (2) the defendant violated this position of trust when he committed each of the charged acts. (CP 40, Instruction No. 30).

During trial, the jury heard evidence that the defendant was in a position of trust with L.M.F. because he was entrusted with the care of L.M.F. (when she was between the ages of six and eight years old), he was a father-figure to L.M.F., and L.M.F. considered the defendant to be her "dad." (RP 159-61). The jury also heard evidence that the defendant violated this position of trust because he used the unique position he had

in L.M.F.'s life to repeatedly sodomize her, to penetrate her vagina with his penis, to force his penis into her mouth, and to make her watch pornographic movies, which he would then "act out" on her. (RP 282-94).

It is not unreasonable to believe the defendant "destroyed L.M.F.'s innocence" when he used his position as a caregiver and as a father-figure to repeatedly rape and molest L.M.F. Further, it is not unreasonable to believe, when the defendant destroyed L.M.F.'s innocence (by using his position of trust to commit the charged acts), he thereby abused her trust.

It is clear from the context of the prosecutor's closing argument and from the evidence that was presented at trial that the prosecutor was using the analogy of "the destruction of innocence" to prove the aggravating factor of "abuse of trust." During closing argument, the prosecutor argued the defendant had a duty and an obligation to protect L.M.F. from harm and he had a duty as a "father" to L.M.F. (RP 363-64). In other words, the defendant was in a position of trust. The prosecutor then argued the defendant "abused" this position of trust when he committed the charged acts. (RP 364). The prosecutor directly linked the "destruction of innocence" to the sentencing aggravator for "abuse of trust when she said the defendant "horribly abused the ultimate position of trust...to protect [L.M.F.'s] innocence." (RP 364). The prosecutor clarified that her argument was based on the evidence that was presented

at trial because she went on to explain how the evidence presented at trial satisfied the elements of each charged offense. (RP 364-69). Certainly, the prosecutor could have made her argument more artfully. However, the prosecutor's argument was based on the evidence that was presented at trial and the prosecutor's argument was relevant to proving the aggravator of "abuse of trust." Consequently, the prosecutor's argument was not improper.

b. The prosecutor's comment, that it was "not fun" for L.M.F. to be at trial was not an improper because the prosecutor was properly commenting on the credibility of the victim.

During closing argument, the prosecutor said:

> *And this instruction here talks about credibility of witnesses. And, what you are to look at in evaluating whether a witness is credible. Some of things are their memory while testifying, their demeanor, any personal stake that they may have, any bias that they have.*
> ...
>
> She told her mom, she told her grandma, she told Detective Holladay...[s]he came in here and told all of you, in front of the person that did it to her. A little child had to come in here and tell all of you about these horrible things that happened to her and be cross-examined by the defense attorney. Do you think that was fun for her? Obviously it wasn't. And, you saw her demeanor and you saw a frightened little girl up here. This is not fun for her. None of it is fun.
>
> *And, ask yourselves, if this weren't true, how could she have maintained this consistency in saying what happened*

> *to her over all those months and repeated conversations about it...[h]ow does she know all of those things that she knows if this didn't happen to her?*[7]

- (RP 370-71).

In *Gregory*, the defendant also claimed the prosecutor improperly appealed to the jury's passion and prejudice when the prosecutor elicited testimony from an alleged rape victim that testifying at trial was "horrible" and she "wouldn't want [her] worst enemy to have to go through what [she had] done." *Gregory*, 158 Wn.2d at 805-06. In closing, the prosecutor argued the jury could infer from these statements that the victim was credible because she would not put herself through the "trial process" simply to avenge the defendant for money he owed her. *Id*, at 806. On review, the Supreme Court acknowledged the case came down to whom the jury believed. *Id*, at 807. The Court found the prosecutor's comment was not an improper appeal to the jury's passion or prejudice because the prosecutor was allowed to argue how and why the State's witness was credible. *Id*, at 808-09 (also finding the jury instruction

[7] The defendant did not object to any of the prosecutor's arguments at trial.

explaining that the jury should not let sympathy guide its decision would cure any "sympathetic tendencies" in this regard).[8]

Reviewing the prosecutor's comment in the context in which it was made, it is clear the prosecutor said it was "not fun" for L.M.F. to testify at trial as part of her larger argument that L.M.F. was a credible witness. Immediately before the prosecutor made the challenged comment, she directed the jury to the instruction on credibility. (RP 370-71, CP 9, Instruction No. 1). Immediately after the prosecutor made the challenged comment, she said: "ask yourselves, if this weren't true, how could she have maintained this consistency in saying what happened to her over all those months and repeated conversations about it…[h]ow does she know all of those things…" (RP 371).

Notwithstanding the defendant's confession, this case against the came down to whether the jury believed L.M.F. was credible. During cross-examination defense counsel tried to establish L.M.F. was not credible because she would have told someone about the allegations sooner; she had a proclivity to fabricate the allegations because she had

[8] The Court in *Gregory* also found the prosecutor's argument did not implicate the defendant's Constitutional rights because the prosecutor did not argue it was the defendant's fault that the victim had to testify at trial. *Id*, at 808.

unfettered access to pornography, and she had been coached in her statements.[9] (RP 184, 203, 146-47, 256, 304).

The facts in this case closely parallel the facts in *Gregory*. Similarly, it was appropriate during closing argument for the prosecutor to point out all of the facts and circumstances that should lead the jury to conclude L.M.F. was credible. This would include pointing out the consistency of L.M.F.'s in-court and out-of-court statements as well as pointing-out L.M.F.'s willingness to testify at trial and her demeanor at trial.[10]

c. Assuming arguendo, the prosecutor's comments were improper, none of the comments were flagrant or ill-intentioned.

Unlike in *Boehning,* the prosecutor here did not repeatedly refer to facts that pertained to dismissed counts or to inadmissible hearsay in order to argue the jury should find the defendant guilty of all remaining charged counts. Rather, the prosecutor argued, *based on* the facts in evidence, the defendant destroyed L.M.F.'s innocence and, in so doing, he committed

[9] There was no evidence presented at trial that L.M.F. had any access to pornography or that she ever watched it, unless the defendant was showing it to her. Further, there was no evidence presented that L.M.F. ever watched the defendant and her mother, or anyone else, having sex.

[10] Similar to *Gregory*, the prosecutor here never implicated the defendant's Constitutional rights by arguing it was the defendant's "fault" that L.M.F. had to testify at trial.

the charged aggravators of "abuse of trust." Unlike in *Reed* and *Belgrade*, the prosecutor did not appeal to the jury's passion and prejudice by arguing the jury should find the defendant guilty because the defense attorney was a "big city" attorney whom they could not trust, nor did the prosecutor argue the jury should find the defendant guilty because he was part of a terrorist criminal syndicate that indiscriminately killed people. Rather, the prosecutor properly argued the jury could consider whether the victim was credible, based on the consistency of her stories, her demeanor at trial, and her willingness to go through the trial process.

In light of the evidence that was presented at trial, the context in which the prosecutor made these comments, and the issues in the case, the prosecutor's arguments were not improper. Assuming arguendo, any comments were improper, they were not flagrant or ill-intentioned.

2. The prosecutor's comment was improper when she told the jury it had to disbelieve the victim in order to find the defendant not guilty; however, this comment was not flagrant or ill-intentioned.

"[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *and see State v. Barrow* 60 Wn. App. 869, 874, 809 P.2d 209, *rev. denied*, 118 Wn.2d 1007 (1991). Citing to *Fleming* and *Barrow* the

defendant argues the prosecutor committed misconduct when she made the following argument during her rebuttal closing:

> [i]n order to believe the defendant is not guilty, in order to not believe that what [L.M.F.] is saying is true, you have to believe that she is a master manipulator, really sick and twisted, academy award winning actress, I mean, really smart because how else has she been able to maintain what she is saying all - - with all of these people that have talked to her? With her mom? With her grandma? Detective Holladay, with Nurse Stover? With the defense attorney interview? Here in court in front of all you? Man, she's good. If she's not telling the truth, she's good.[11]

- (RP at 405-06), *Brief of Appellant*, at 10-12.

The State concedes the prosecutor's argument was improper because it was a misstatement of the law. *Fleming*, 83 Wn. App. at 213 (finding the jury *must* acquit the defendant unless it believed the victim provided truthful testimony). While acknowledging the prosecutor's argument was improper, this argument was far less flagrant and ill-intentioned than the argument made by the prosecutor in *Fleming*. In *Fleming*, the prosecutor argued during closing argument:

> [l]adies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that

[11] The defendant did not object to this argument at trial.

> [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.

- *Fleming*, 83 Wn. App. at 213.

The prosecutor's argument in *Fleming* did not stop here. The prosecutor went on to argue:

> [t]here is absolutely no evidence . . . that [D.S.] has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.*

- *Fleming*, at 214.

Next, the prosecutor argued:

> [i]t's true that the burden is on the State. But you . . . would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter]. And several things, they never explained.

- *Id.*

On review, Division One found the prosecutor's first comment (similar to the comment to which the defendant takes exception in this case) was improper. *Id*, at 213. However, the Court found, in addition to this comment, the prosecutor also improperly shifted the burden of proof

to the defense and improperly infringed upon the defendants' right to remain silent when the prosecutor argued the defendants would have presented evidence to show the victim was not credible, if such evidence existed. *Id*, at 214. The prosecutor compounded this error when he went on to actually state the defendants had the burden to prove there was *not* a reasonable doubt. *Id*, at 214-15. The Court found it was the totality of these constitutionally improper arguments, when considered together, which mandated reversal. *Id*, at 216. The Court stated:

> [w]e conclude that the misconduct, taken together and by cumulative effect, rose to the level of manifest constitutional error, which we cannot find harmless beyond a reasonable doubt given the nature of the evidence at trial. Accordingly, the failure of the defense to object contemporaneously does not preclude review. We reverse and remand for a new trial.

- *Id.*

In contrast to *Fleming*, there have been numerous cases in which the courts have found reversal is not warranted when the prosecutor argues the jury has to "disbelieve" the State's witnesses in order to find the defendant not guilty. This is the case even though the courts have agreed such an argument is improper. For example, in *Barrow*, a case to which the defendant cites, the Court found reversal was not warranted when the prosecutor argued during rebuttal that the jury had to "completely disbelieve" the testimony of the officers in order to find the defendant not

guilty. *Barrow*, 60 Wn. App at 874, 877 (finding, when defendant objected to this improper argument, reversal was not warranted because it was "not substantially likely that the comments affected the jury's verdict," when comments were considered in context with the earlier evidence and the circumstances of the trial in which the comments were made); *State v. Casteneda-Perez*, 61 Wn. App. 354, 364, 810 P.2d 74 (1990) (when defendant properly objected to prosecutor's repeated attempts to get defendants to concede officers must be lying, finding reversal was not warranted because officers' testimony was believable and corroborated, while defendants' testimony was not persuasive); *State v. Riley*, 69 Wn. App. 349, 353-54, 848 P.2d 1288 (1993) (when defendant did not object to prosecutor's improper closing argument that the jury had to disbelieve the officers in order to find the defendant not guilty, finding reversal was not warranted because defendant could not show the isolated comment was "so egregious that the resulting prejudice could not have been obviated by a curative instruction"); *State v. Wheless*, 103 Wn. App. 749, 758, 14 P.3d 184 (2000) (when defendant did not object to prosecutor's closing argument that "in order to find [the defendant] innocent, the police of Seattle, WA., must be lying," finding prosecutor's argument was arguably improper but reversal was not warranted because defendant could not demonstrate argument was so flagrant and ill-

intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury).

Similar to the courts' findings in *Barrow*, *Castenada-Perez*, *Riley*, and *Wheless*, this court should find that the prosecutor's argument in our case, though improper, does not warrant reversal because it was not flagrant and ill-intentioned. First, it is apparent that the prosecutor's argument was a heart-felt, albeit ill-thought, attempt to respond to the defendant's closing argument, in which defense counsel ceaselessly attacked L.M.F.'s credibility and provided erroneous analogies of the reasonable doubt standard. For example, defense counsel argued L.M.F. was not credible because she had been manipulated by her mother into saying she had been "child molested;" she had been "locked in" to her original statement and could not escape it; she had a "soft voice" and she "held her head down" when she testified; and she had a "fascination" with pornographic movies.[12] (RP 378-80, 383-85). Defense counsel went on to argue there was a "huge list" of reasonable doubts, which included arguments he had not thought to make. (RP 403). Defense then argued, the jury must find the defendant not guilty if any of them said: "I've got a doubt because I just - - I don't know, I just can't really fix in my mind

[12] No evidence was presented to support this argument.

what happened…I don't have a mental picture of what happened." (RP 403-05).

The State does not attempt to justify the prosecutor's argument by claiming she was "provoked" by the defendant; however, the context in which the improper argument was made demonstrates the argument was not flagrant or ill-intentioned. Moreover, because the prosecutor's improper argument was a *response* to the defendant's closing argument, it is unlikely the argument "would have the capacity to so inflame the jury that there is a substantial likelihood that the defendant was denied a fair trial." *Barrow*, at 878 (finding, when prosecutor's rebuttal argument was a response to defendant's closing argument, it was unlikely prosecutor's argument "overcame the jury's ability to perform its function").

Also, unlike in *Fleming*, where the prosecutor repeatedly attacked the defendant's constitutional rights during closing argument, the prosecutor's improper argument in this case was singular and isolated. The prosecutor did not follow-up her improper argument with additional comments that implicated the right to remain silent, that shifted the burden of proof, or that implied the defendant had the burden of presenting exculpatory evidence. Rather, the prosecutor immediately went on to explain how the details provided by L.M.F. proved she was credible. (RP

at 408-09). Then, the prosecutor properly explained the reasonable doubt standard by stating:

> [a]nd if you believe what [L.M.F.] told you, if you have an abiding belief in what she is saying, that that happened to her that's all you need. That's all you are required to have.
>
> And that, coupled with his confession, with his admission to her mother that he would rub his penis on her – on her butt, shows that he is guilty...

- (RP 409).

The extraordinary remedy of reversal was warranted under the facts and circumstances in *Fleming*. The facts and circumstances in our case are distinguishable from *Fleming* because they demonstrate the prosecutor's argument was not flagrant or ill-intentioned. Consequently, the extraordinary remedy of reversal should not apply in this case.

3. Any resulting prejudice from the prosecutor's comments during closing argument could have been cured by an appropriate instruction.

The State concedes the prosecutor's argument was improper when she told the jury it could only find the defendant "not guilty" if it did not believe the victim. The State does not concede that the prosecutor's remarks were improper when she commented on the "destruction of innocence" and when she commented that it was "not fun" for L.M.F. to

testify. However, assuming for the sake of argument, this Court finds *any* of the prosecutor's comments were improper, the Court should also find these comments were not so flagrant and ill-intentioned that any resulting prejudice could not be obviated by an appropriate curative instruction.

The defendant did not object to any of the prosecutor's arguments during trial. Consequently, he did not give the trial court the opportunity to remedy any potential error at the time it occurred. The defendant objected on a number of other occasions throughout trial. As such, the defendant's failure to object to the prosecutor's comments during closing argument should strongly suggest the comments appeared to be of little consequence at the time they were made and in the context of the trial. *Swan*, 114 Wn.2d at 613.

First, regarding the prosecutor's comments that the defendant destroyed L.M.F.'s innocence and that it was "not fun" for L.M.F. to testify, the jury was properly instructed regarding the following: the jury was instructed it must "decide the case based upon the evidence presented to [it] during trial;" they were instructed that only evidence they could consider was the testimony of the witnesses, any stipulations, and any exhibits that were admitted; they were instructed that the lawyers' statements were not evidence; they were instructed they should disregard any statements that was not supported by the evidence; and they were

instructed to not let their "emotions overcome [their] rational thought process" and to "reach [their] decision based on the facts proved...and on the law given...not on sympathy, prejudice, or personal preference." (CP 8-10, Instruction No. 1).

Next, regarding the prosecutor's argument that the jury could only find the defendant "not guilty" if it did not believe the victim, the jury was properly instructed on the following: the jury was properly instructed on the reasonable doubt standard; they were instructed that the State had to prove each element of each crime beyond a reasonable doubt and that the defendant had no burden to prove a reasonable doubt existed as to these elements; they were instructed as to the elements of each crime; they were instructed that the defendant was not required to testify and that his decision to not testify could not be used against him; they were instructed that the defendant was presumed innocent at all stages of trial; they were instructed that the lawyers' comments were not evidence; they were instructed to disregard any comments that were not supported by the evidence or the law; and they were instructed that they were the sole judges of credibility. (CP 8-10, 12, 13, 21-28, Instruction No. 1, 3, 4, 12-19).

The jury is presumed to follow the court's instructions. *State v. Trout*, 125 Wn. App. 403, 420, 105 P.3d 69 (2005). When the defendant

does not object to the prosecutor's arguments, request a curative instruction, or move for a mistrial, it is the defendant's burden to show the prosecutor's arguments were so flagrant and ill-intentioned, any resulting prejudice could not be cured by an appropriate instruction. The defendant in this case has not made this showing. The prosecutor's comments in this case stand in sharp contrast to the flagrant and ill-intentioned comments that were made by the prosecutor's in *Fleming*, *Boehning*, *Reed*, and *Belgrade*. It is reasonable to believe, if the prosecutor's comments resulted in *any* prejudice, the court could have obviated that prejudice by calling the jury's attention to any of the instructions listed above.

4. The State presented substantial evidence that the defendant was guilty; therefore, it is unlikely the prosecutor's comments affected the trial's outcome.

The prejudicial or inflammatory effect of a prosecutor's comments must be viewed in context with the evidence that was presented and with the circumstances of the trial in which the comments were made. *Barrow*, at 877 (given the evidence presented at trial and given a comparison of the comments to comments made in other cases, finding reversal was not warranted because it was "not substantially likely that the comments affected the jury's verdict"). In this case, given the substantial evidence

that was presented at trial, it is unlikely the prosecutor's comments affected the verdict.

a. The defendant confessed to raping and molesting L.M.F.

The defendant admitted to his fiancée that he "rubb[ed] his penis on [L.M.F.'s] privates" - - "he rubbed his penis on her "butt." (RP 172, 189). He said he did it "just twice." (RP 172). There was no evidence that the defendant was under any coercion or duress when he made this confession. The defendant and Fowler went to sleep together, in the morning Fowler again asked the defendant "what he did to [L.M.F.], the defendant cried, and he admitted to his acts. (RP 172, 190). Fowler did not threaten the defendant in order to get this information, she did not issue any ultimatums, there were no police present, and there were no police waiting to arrest the defendant. While at home, Fowler simply told the defendant she "needed closure." (RP 172). There was no evidence that Fowler "suggested" this confession to the defendant because she did not know any of the details of the sexual assaults at the time. (RP 190). There was no evidence that Fowler had a motive to fabricate the defendant's confession. She testified she loved the defendant, they were engaged to be married, and she trusted him as a father to her daughter.

(RP 159-61). Fowler testified, even after the defendant confessed, they were on good terms. (RP 173).

b. L.M.F. provided an exceedingly detailed and nuanced account of what the defendant did to her.

L.M.F. said the defendant sexually assaulted her when she was between the ages of six and eight. He assaulted her when they lived in the old apartment and when the lived in the new house. He did it when her mother was not home. (RP 137, 140). He assaulted her in the bedroom, in the bathroom, on the couch, and in his bedroom. He took her clothes off. He licked her "crotch with his mouth." (RP 287). He "tried to stick his wiener in [L.M.F.'s] bottom...[h]e was trying to put [her] on the floor and [she] was screaming and crying...[a]nd then he tried to stick it in...and he told me to shut up and just relax." (RP 287). He tried to kiss her on the lips, to kiss her on the neck in his bed, he tried to go up and down on me and put his "wiener" in her "crotch." (RP 288). L.M.F. said the defendant would spit on his hand and then stroke his penis. (RP 293). She said, "[a]nd then he likes to put it back in...[into] my crotch." (RP 294). L.M.F. said sometimes he would only lick her "private part," sometimes he would only touch her "private part," and sometimes he would only "stick his wiener" inside her. (RP 138-39, 141). L.M.F. said this happened at least twenty times. (RP 136, 140). L.M.F. said it "tickled" when he

licked her "private part" and it "hurt" when the defendant tried to stick his penis in her. (RP 200, 245).

L.M.F. said the defendant always wore a blue and green striped robe and his penis would stick "straight up" when he wore it. (RP 200). L.M.F. described the defendant's penis as looking "pink and white." (RP 142). L.M.F. said, "[h]e tries to put his wiener in me and that's when the liquid was coming from his wiener." (RP 290). L.M.F. said the liquid "was a milk liquid that looked liked pus and he said it makes him feel like pleasure." (RP 291). She said the liquid would go "[o]n my bottom and on my crotch." (RP 291). L.M.F. said the defendant would use a "black cloth" to wipe off the liquid. (RP 293). L.M.F. said the defendant would make the "milky white stuff" come out when they watched pornographic movies. (RP 293).

c. L.M.F. provided information she could only know if she was actually sexually assaulted.

On cross-examination, defense counsel asked L.M.F. if she had ever seen the people in the videos licking each other - L.M.F. said she had not. (RP 146). L.M.F. said she had never send the defendant and her mother having sex; she only knew that the defendant and her mother had sex "because he told [her]." (RP 153). There was no evidence that L.M.F. ever watched pornography, unless the defendant was showing it to her.

L.M.F. testified she kicked the defendant and screamed at him when he assaulted her for the first time. This is not a response that she would have seen in pornographic movies. L.M.F. said the defendant "wiped off" the "milky white stuff" with a black cloth. This is not an activity she would have seen in pornographic movies. L.M.F. said it tickled when he licked her private parts and it hurt when he tried to put his penis inside her. These are sensations she would only know if she experienced them. L.M.F. described the color of the defendant's penis. She would only know this if the defendant showed his penis to her. Also, L.M.F. experienced symptoms consistent with being sexually assaulted months before she reported the assault when she complained to her mother that her "privates" were hurting.

d. L.M.F. provided consistent accounts of what the defendant did to her to multiple people and over an extended period of time.

L.M.F. provided a consistent, and a consistently detailed, rendition of events to her grandmother, Detective Holladay, and Marsha Stover. L.M.F. provided these accounts over a period of two months. L.M.F. testified consistently with these accounts at trial, five months after she initially reported the assault.

e. L.M.F. was not coached.

L.M.F.'s mother simply told her daughter she could "tell her anything." (RP 167). L.M.F.'s grandmother told L.M.F. if she wanted to talk, that was fine, if she did not want to talk, that was fine too. (RP 199). Detective Holladay said he used only generalized, non-leading, non-suggestive questions such as, "what do you think is the reason I am here" when he interviewed L.M.F. (RP 274, 281). Similarly, Marsha Stover said she asked L.M.F. only open-ended, non-suggestive questions, such as: "well, what happened?" (RP 245). Also, it is worth noting, when Detective Holladay asked L.M.F. if the defendant took pictures of her, she said "no." (RP 292). When he asked her if the defendant showed her pornography on the internet, she said "no." (RP 293).

f. L.M.F.'s delay in reporting made sense.

L.M.F. said the defendant repeatedly told her, if she told her mother or the police, she would never see her family again. (RP 288). It was not until she went to church on March 13, 2010, that L.M.F. learned what the defendant had been doing to her was actually "wrong" and he would be "in trouble with God" for doing it. (RP 155). She told her mother about the sexual assaults when she returned from church that day. (RP 155-56). Further, that same day, L.M.F. said the defendant put his

blue and green striped robe on again. (RP 246). L.M.F. said she knew this meant it would happen again and she knew she had to tell her mother because her mother would be leaving her alone with the defendant again. (RP 246, 288-89).

g. L.M.F. did not have a motive to fabricate.

There was no evidence that L.M.F. had any motive to fabricate these allegations. By all accounts, L.M.F. had a good relationship with the defendant. She loved him. He was her "dad." (RP 159-61, 193-95).

The court on review should defer to the fact finder on issues of credibility and the weight of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). Here, the evidence that the defendant repeatedly raped and molested L.M.F. was substantial. Consequently, it is unlikely any improper comment by the prosecutor affected the outcome of the trial.

5. For these same reasons, any error was harmless.

The defendant has not satisfied his burden in showing the prosecutor's comments constituted manifest error affecting a constitutional right. However, assuming any of the prosecutor's comments were manifest constitutional error, the error was harmless because, for the same reasons cited above, the evidence presented at trial

was overwhelming and, despite any error, it is reasonable to conclude the jury would have found the defendant guilty beyond a reasonable doubt. *Fleming*, at 215-216 (finding manifest constitutional error is harmless if the evidence is overwhelming because, despite the error, the jury would have found the defendant guilty beyond a reasonable doubt).

6. The issue of prosecutorial misconduct has been waived.

The defendant did not object to any of the prosecutor's comments at the time of trial. On appeal, the defendant cannot show any of the prosecutor's comments were so flagrant and ill-intentioned that they could not be obviated by an appropriate curative instruction. Consequently, the defendant has waived the issue of prosecutorial misconduct for appeal.

C. CONCLUSION

For each of the foregoing reasons, the trial court should be affirmed.

DATED this 26 day of September, 2011.

Respectfully submitted:

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